

K&L GATES

November 27, 2024

Loly Garcia Tor  
Partner  
loly.tor@klgates.com

**Via ECF**

T +1 973 848 4026  
F +1 973 848 4001

Hon. Jamel K. Semper, U.S.D.J.  
United States District Court for the District of New Jersey  
Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

**Re: *Ylitalo v. Automatic Data Processing, Inc., et al.***  
**Case No. 2:24-cv-7635-JKS-LDW / Submitted Under Seal**

Dear Judge Semper:

I represent Defendant American Century Investment Services, Inc. (“American Century”) in the above-referenced action. On behalf of American Century and defendants Automatic Data Processing, Inc. and ADP, Inc. (collectively, the “Defendants”), we write to update the Court on matters relevant to Defendants’ September 23, 2024 Response to Motion of Dale Ylitalo for Appointment as Lead Plaintiff and Approval of Counsel (“Defendants’ Response”) (ECF No. 32).

As noted in Defendants’ Response, the Complaint in this action alleges that an ADP sales representative stated to Mr. Ylitalo that “his estimated return” on the SIMPLE IRA in which he invested “would be 6.00%,” but that the actual rate of return on his account allegedly was “closer to 4%.” (Defendants’ Response at 6, citing allegations appearing in Paragraphs 69 and 78 of the Complaint (ECF 1).) Plaintiff’s September 27, 2024 Reply to Defendants’ Response to Plaintiff’s Motion for Appointment of Lead Plaintiff and Approval of Counsel repeats the contention that Mr. Ylitalo’s IRA investment “continue[s] to perform below the rate he was promised.” (ECF No. 33 at 5)

Lower than anticipated investment returns do not constitute an “out-of-pocket” loss recoverable under the federal securities laws,<sup>1</sup> but in any case, the rate of return Mr. Ylitalo has enjoyed on his account since the initial contribution was made to that account on August 17, 2023 has exceeded the rate of return he claims he was “promised” before establishing the account.

---

<sup>1</sup> *Barney Holland Oil Co. v. FleetCor Techs, Inc.*, 2008 WL 11407200, at \*12-13 (N.D. Ga. Mar. 3, 2008) (the appropriate measure of damages in a securities fraud action is the plaintiff’s “out-of-pocket loss,” which excludes “what the plaintiff might have gained if the defendant had performed as promised . . . .”)

Specifically, as appears from the attached Declaration of Margaret Murphy, the rate of return on Mr. Ylitalo's IRA account, from August 17, 2023 through November 22, 2024, has exceeded 9%.

Defendants respectfully request that the Court consider *sua sponte* the foregoing facts in ruling upon Plaintiff's Motion, consistent with the authorities cited at pages 5-6 of Defendants' Response.

Respectfully submitted,

/s/ Loly Garcia Tor

Loly Garcia Tor

cc: All counsel of record [via ECF]